Supreme Court, U.S.
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NO. 94-1231

THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

JOSEPH R. CATERINA
AND ALL OTHERS SIMILARLY SITUATED, ET AL.,
Petitioners

-against-

BLAKELY BOROUGH, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE THIRD CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION ON BEHALF OF DEPARTMENT OF GENERAL SERVICES, DEPARTMENT OF ENVIRONMENTAL RESOURCES, AND DEPARTMENT OF TRANSPORTATION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the district court erroneously dismissed the case for lack of jurisdiction.

2. Whether the imposition of sanctions by the circuit court of appeals is a violation of Petitioner's constitutional rights.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, Joseph R. Caterina, and the following defendants/appellees (listed as they appeared in the style of the case):

BLAKELY BOROUGH; ARCHBALD BOROUGH, LACKAWANNA COUNTY REDEVELOPMENT AUTHORITY; LACKAWANNA COUNTY; DEPARTMENT OF ENVIRONMENTAL RESOURCES OF PA.; DEPARTMENT OF GENERAL SERVICES OF PA.; GENERAL STATE AUTHORITY OF PA.; LACKAWANNA COUNTY SHERIFF'S OFFICE; UNITED STATES ARMY CORPS OF ENGINEERS; U.S. DEPARTMENT OF INTERIOR; CECO ASSOCIATES, INC., a Corporation of PA.; PA. DEPARTMENT OF TRANSPORTATION; THE LAW FIRM OF FOLEY, MCLANE, NEALON, FOLEY & MCDONALD; JOSEPH M. MCDADE; JOHN ORMASA; HILLS OF ARCHBALD, INC., a Corporation of PA.; UNKNOWN OWNER 528-526 SHORT AVE., PECKVILLE, PA.; U.S. DEPARTMENT OF SURFACE MINING IN N.E. PA.; and EDWARD J. GHILARDI; ET AL.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv, v
OPINIONS BELOW	1
BASIS FOR JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	3
COUNTERSTATEMENT OF THE CASE	5
REASONS FOR DENYING WRIT	7
CONCLUSION	12
APPENDIX	A

TABLE OF AUTHORITIES

Page(s)

CASES

Caterina v. Blakely Borough, et al, 37 F.3rd 1486 (3d Cir. 1994) 2

Chambers v. NASCO, Inc. 501 U.S. ____, 111 S. Ct. 2123 (1991) 11

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 417 (1982) 9

Strawbridge v. Curtiss, 7 U.S. 267 (1806) 7

Williamson County Regional Planning Com. v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 8

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

Fed. R. App. P. 38 4,6,10,11

Fed. R. Civ. P. 11 11

National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(b) 10

Pennsylvania Eminent Domain Code, 26 P.S. §§ 1-101, et seq. 8

United States Constitution, Amendment V 3

25 Pa. Code 105.15 10

26 P.S. § 1-407 8

28 U.S.C. § 1254(1) 2

TABLE OF AUTHORITIES (CONT'D.)

28 U.S.C. § 1331 3,5

28 U.S.C. § 1332 4,5

42 U.S.C. § 4332 3,10

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OPINIONS BELOW

The Memorandum and the Order of the District Court (Petitioner's Appendix Pages 10 and 7 respectively) have not been reported.

The Judgment Order of the Third Circuit Court of Appeals (Petitioner's Appendix Page 1) is reported at 37 F.3rd 1486 (1994).

BASIS FOR JURISDICTION

The Memorandum and Order of the United States District Court was dated July 23, 1993. The final Order of that court was dated August 18, 1993.

The Judgment Order of the United States Court of Appeals for the Third Circuit was dated August 18, 1994. The Petition for Rehearing was denied on September 14, 1994.

This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

National Environmental Policy Act, 42 U.S.C. 4332:

> The Congress authorizes and directs that ... (2) all agencies of the Federal government shall --
>
> (C) include in every recommendation or report on proposals for ... major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
>
> > (i) the environmental impact of the proposed action ....

28 U.S.C. § 1331

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1332

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy ... is between --
>
> (1) citizens of different States; ....

Fed. R. App. P. 38

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

COUNTERSTATEMENT OF THE CASE

This suit was instituted in the United States District Court for the Middle District of Pennsylvania by the Petitioner proceeding pro se, complaining of various improprieties in a flood protection project developed by the Pennsylvania Department of Environmental Resources and scheduled to be built by the Pennsylvania Department of General Services in Blakely Borough, Lackawanna County. Some of Petitioner's property in Blakely Borough that was needed to construct the project was acquired by eminent domain instituted by the Borough.

Respondents herein moved to dismiss on the grounds, primarily, of lack of diversity jurisdiction under 28 U.S.C. § 1332 and lack of federal question jurisdiction under 28 U.S.C. § 1331. In its July 23, 1993 Memorandum and Order, the District Court dismissed all Defendants, with the exception of the Lackawanna County Sheriff's Office, for lack of subject matter jurisdiction. After Petitioner supplied the court with addi-

tional information regarding the conduct of Sheriff's Office personnel, on August 18, 1993 the District Court ordered the Complaint dismissed in its entirety for lack of subject matter jurisdiction. In this Order, furthermore, the District Court specifically certified that any appeal would be frivolous, not taken in good faith, and lacking in probable cause.

Petitioner appealed nonetheless. The Court of Appeals for the Third Circuit affirmed the District Court's judgment. Pursuant to Fed. R. App. P. 38, the court additionally ordered Petitioner to pay double costs.

REASONS FOR DENYING THE WRIT

No amount of rhetoric on Petitioner's part can convert the present case into one that warrants the granting of his petition. First, the district court found, and the court of appeals agreed, that diversity jurisdiction did not lie. The District Court noted in its Memorandum that Petitioner apparently presumed that so long as one party was not a citizen of the state, diversity jurisdiction existed. Petitioner and most of the defendants, however, are citizens of Pennsylvania, and therefore diversity jurisdiction was not present. *Strawbridge v. Curtiss,* 7 U.S. 267 (1806).

Secondly, the district court found, and the court of appeals agreed again, that federal question jurisdiction did not lie either. In two ways, the court addressed the "taking" issue raised by Petitioner in his complaint. The court first pointed out that Petitioner did not assert an unconstitutional taking of his property. The Petitioner never alleged in his complaint that he either was not

offered compensation, in accordance with the Pennsylvania Eminent Domain Code, 26 P.S. 1-101, et seq., or that the compensation offered was not just. (Petitioner's App. Page 12) If a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Fifth Amendment's just compensation clause until [he] has used the procedure and been denied just compensation. *Williamson County Regional Planning Com. v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985). Section 1-407 of the Pennsylvania Eminent Domain Code provides just such a procedure. Petitioner was offered compensation by the Borough. When no response from him was forthcoming, the money was paid into the county court so that possession of the property condemned could be obtained. To the knowledge of Respondents herein, Petitioner has never availed himself of the provisions of § 1-407 to dispute the amount offered and paid into court.

As to the next "taking" issue, the district court found the Petitioner's suggestion that the potential for flooding allegedly to be caused by the flood protection project was purely speculative. The court further determined that periodic flooding does not state a claim under the Fifth Amendment. (Petitioner's App. Page 12). The court's stance was in keeping with unequivocal statements of this Court. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 417 (1982), the Court discussed a number of cases involving takings claims for flooding and then concluded that it has consistently distinguished between flooding cases involving a permanent physical occupation and cases involving a more temporary invasion. "A taking has always been found only in the former situation." *Id.* at 428. If any of the conjectured flooding were to take place after this flood protection project is built, the flooding would be of a temporary nature only, and it would, therefore, not qualify as a "taking."

Although not addressed specifically by the district court, in his complaint and again in his Petition (Petitioner's Pet. Page 9) Petitioner alleges the lack of an Environmental Impact Statement (EIS) on the part of the government. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 - 4370(b), which requires a statement on the environmental impact of proposed action, by its plain language applies to Federal Government agencies only. 42 U.S.C. § 4332. Because this project does not involve "major Federal actions", an EIS is not required.

On the state level, an environmental assessment on the impact of this project was performed by the Department of Environmental Resources in accordance with 25 Pa. Code §105.15, prior to the issuance of the dam and waterway permits needed for construction of the project by the Department of General Services.

With respect to the double-cost sanctions imposed by the circuit court pursuant to Fed. R. App. P. 38, Petitioner chose to ignore the possibility of sanctions

being imposed as set forth in Fed. R. Civ. P. 11 and Fed. R. App. P 38. Even though acting *pro se*, Petitioner has demonstrated throughout the history of this case that he can read and interpret the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure quite satisfactorily. The district court, moreover, in its August 18 Order put him on notice that any appeal would be frivolous, not taken in good faith, and lacking in probable cause. Finally, respondents herein filed a separate motion for summary action and imposition of sanctions with the circuit court, a copy of which was mailed to Petitioner via first class mail. (Respondents' App. A)

Petitioner's actions were sanctionable according to Fed. R. App. P. 38. Additionally, this Court has recently sustained the "inherent power" of federal courts to impose sanctions for bad-faith conduct. *Chambers v. NASCO, Inc.*, 501 U.S. ____, 111 S.Ct. 2123 (1991). Clearly, the circuit court's imposition of sanctions did not violate Petitioner's constitutional rights.

CONCLUSION

The Petitioner does not assert that the decision herein is in conflict with the decisions of other circuits or is contrary to any decision of this Court. There is no important question of constitutional law requiring review by this Court. This case has been prolonged by Petitioner beyond all reason.

WHEREFORE, Respondents herein respectfully submit that this petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOSEPH R. CATERINA, Appellant	:	
vs.	:	
BLAKELY BOROUGH, et al., Appellees	:	No. 93-7565

MOTION FOR SUMMARY ACTION
AND IMPOSITION OF SANCTIONS

AND NOW, comes the Appellees, The General State Authority and the Commonwealth of Pennsylvania, acting by and through the Department of General Services, the Department of Transportation and the Department of Environmental Resources, and, pursuant to 3rd Cir.LAR 27.4, move this Honorable Court to affirm the Order of the U.S. District Court for the Middle District of Pennsylvania entered on August 18, 1993 to Civil Docket No. 3:CV-93-512 on the grounds that no substantial question is presented.

Appellees further move this Honorable Court to award just damages and single or double costs, pursuant to F.R.A.P. 38, to Appellees from Appellant on the grounds that Appellant's appeal is frivolous, is not taken in good faith, and is lacking in probable cause.

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Respondents' Appendix

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Dated: November 10, 1993